89

Supreme Court, U.S.
FILED

07 1 2 4 9 MAR 2 8 2008

OFFICE OF THE CLERK

No. ①

IN THE

# Supreme Court of the United States

SONYA DENIECE RANKIN,

*Petitioner*,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

*Respondents*.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA SUPREME COURT

## PETITION FOR WRIT OF CERTIORARI

Robert Joseph Beles California Bar no. 41993
Paul Gilruth McCarthy California Bar no. 139497
1 Kaiser Plaza, Suite 2300
Oakland, California 94612-3642
Tel. No. (510) 836-0100
Fax No. (510) 832-3690

*Counsel for Petitioner*

## QUESTIONS PRESENTED FOR REVIEW

1. Whether the Sixth Amendment, as construed in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435, 68 U.S.L.W. 4576 (2000) and *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403, 72 U.S.L.W. 4546 (2004), requires that facts (other than prior convictions) necessary to imposing consecutive sentences be found by the jury or admitted by the defendant?

2. Whether the Sixth Amendment, as construed in *Apprendi v. New Jersey*, *Blakely v. Washington*, and *Cunningham v. California*, – U.S. —, 127 S. Ct. 856; 166 L. Ed. 2d 856, 75 U.S.L.W. 4078 (2007), requires that all facts (other than prior convictions) necessary to imposing aggravated terms be found by the jury or admitted by the defendant. ?

3. Whether California's sentencing adopted after *Cunningham v. California*, which eliminated the presumption of the midterm and gave sentencing judges "discretion" to choose any of the three terms, while not changing anything else, including the sentencing factors, violates *Cunningham?*

## LIST OF ALL PARTIES

### Petitioner

SONYA DENIECE RANKIN.

### Respondent

PEOPLE OF THE STATE OF CALIFORNIA.

## TABLE OF CONTENTS AND TABLE OF AUTHORITIES

### Table of Contents


*section* *page number*

QUESTIONS PRESENTED FOR REVIEW ..... i

LIST OF ALL PARTIES ..... i

TABLE OF CONTENTS AND TABLE OF AUTHORITIES ..... ii

CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE BY COURTS OR ADMINISTRATIVE AGENCIES. ..... 1

BASIS FOR JURISDICTION IN THE SUPREME COURT ..... 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED ... 1

United States Constitution ..... 1

State Statutes ..... 2

California Rules of Court ..... 7

STATEMENT OF THE CASE ..... 10

1. Statement of the Case ..... 10

2. Statement of Facts ..... 12

*section* *page number*

a. Main trial. . . . . 12

b. Second trial on sentencing factors . . . . . 14

c. Sentencing . . . . . 16

3. Direct appeal in State courts. . . . . 17

ARGUMENT . . . . . 18

1. This Court has already granted certiorari on the issue of whether the imposition of consecutive sentences falls within the *Apprendi/Blakeley* rule. . . . . 18

2. There is a conflict between various state courts, including the California Supreme Court, on the issue of whether the Sixth Amendment applies to imposition of consecutive sentences. . . . . 20

3. California has attempted to avoid this Court's decision in *Cunningham v. California* regarding the imposition of aggravated terms by attempting to recast California's determinate sentencing law as "discretionary." This involves an important question of Federal law that this court should grant certiorari to resolve. . . . . 21

a. "Recidivism factor" exception . . . . . 21

*section* *page number*

b. Recasting sentencing scheme as "discretionary." ..... 23

4. As the sentencing court did not have authority under California law to convene an ad hoc jury on sentencing factors, it makes no difference that jurors may have found some of the factors the sentencing court relied on in imposing consecutive sentences. ..... 26

CONCLUSION ..... 28

APPENDIX (state court opinions) .. appendix-1 and following

**Table of Authorities**

*cases* *page number*

*Apprendi v. New Jersey*, 530 U.S. 466,
120 S. Ct. 2348, 147 L. Ed. 2d 435,
68 U.S.L.W. 4576 (2000) ..... i, 18, 20, 22-24, 26

*Blakely v. Washington*, 542 U.S. 296,
124 S. Ct. 2531, 159 L. Ed. 2d 403,
72 U.S.L.W. 4546 (2004) ..... i, 14, 18-20, 26, 27

*Cunningham v. California*, – U.S. —,
127 S. Ct. 856; 166 L. Ed. 2d 856,
75 U.S.L.W. 4078 (2007) ..... i, 18, 20, 24, 25, 26

*cases* *page number*

*Jones v. United States*, 526 U.S. 227,
119 S. Ct. 1215, 143 L. Ed. 2d 311,
67 U.S.L.W. 4204 (1999) ..... 19

*Oregon v. Ice*, No. 07-901 (March 17, 2008),
2008 U.S. LEXIS 2387; 76 U.S.L.W. 3496 ..... 18, 20

*People v. Black*, 35 Cal. 4th 1238,29 Cal. Rptr. 3d 740,
113 P.3d 534 (2005) ("*Black I*") ..... 24, 25

*People v. Black*, 41 Cal 4th 799, 62 Cal. Rptr. 3d 569,
161 P.3d 1130 (2007) ("*Black II*") ..... 21, 22

*People v. Sandoval,* 41 Cal. 4th 825, 161 P.3d 1146,
62 Cal. Rptr. 3d 588 (2007) ..... 23, 27

*People v. Wagener*, 196 Ill. 2d 269, 752 N.E.2d 430,
256 Ill. Dec. 550, *cert den sub nom*,
*Wagener v. Illinois*, 534 U.S. 1011,
122 S. Ct. 498, 151 L. Ed. 2d 408 (2001). ..... 21

*State v. Cubias*, 155 Wn. 2d 549, 120 P.3d 929 (2005) .... 21

*State v. Ice*, 343 Ore. 248, 170 P.3d 1049 (2007) .. 18, 20, 21

*statutes* *page number*

28 U.S.C. section 1257(a) ..... i, 20, 23

California Penal Code section 18 ..... 18, 20

California Penal Code section 182(a)(1) ..... 24, 25

California Penal Code section 186.11(a)(1) ..... 21, 22

California Penal Code section 186.11(a)(2) ..... 23, 27

California Penal Code section 484(a) ..... 21

California Penal Code section 487(a) ..... 18, 20, 21

California Penal Code section 489(a) ..... 3

California Penal Code section 496(a) ..... 4, 10

California Penal Code section 654 ..... 4, 12

California Penal Code section 1170 ..... i, 14, 18-20, 26, 27

former California Penal Code section 1170 ..... 5

California Penal Code section 12022.1 ..... 19

United States Constitution, Fourteenth Amendment .... 1

United States Constitution, Sixth Amendment .... 1, 25-27

*court rules* *page*

California Rules of Court 4.420. . . . . 7

California Rules of Court 4.421 . . . . . 8, 22, 23

California Rules of Court 4.425. . . . . 10

## CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE BY COURTS OR ADMINISTRATIVE AGENCIES.

The California Supreme Court's order and California Court of Appeal's opinion are unpublished. They are attached as an appendix.

## BASIS FOR JURISDICTION IN THE SUPREME COURT

1. Date of entry of order sought to be reviewed: January 3, 2008 (order denying petition for review).

2. Date of any order respecting rehearing: not applicable.

3. Statutory provision believed to confer on this Court jurisdiction to review on a writ of certiorari the judgment or order in question: 28 U.S.C. section 1257(a).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

### United States Constitution

**Sixth Amendment.** In all criminal prosecutions, the accused shall enjoy the right to a ... trial, by an impartial jury...

**Fourteenth Amendment**. Section. 1. ..... No State shall ... deprive any person of life, liberty, or property, without due process of law...

## State Statutes

**California Penal Code section 18:** Except in cases where a different punishment is prescribed by any law of this state, every offense declared to be a felony, or to be punishable by imprisonment in a state prison, is punishable by imprisonment in any of the state prisons for 16 months, or two or three years.

**California Penal Code section 182(a)(1).** If two or more persons conspire ... to commit any crime... they shall be punishable in the same manner and to the same extent as is provided for the punishment of that felony.

**California Penal Code section 186.11(a)(1):** Any person who commits two or more related felonies, a material element of which is fraud or embezzlement, which involve a pattern of related felony conduct, and the pattern of related felony conduct involves the taking of, or results in the loss by another person or entity of, more than one hundred thousand dollars ($100,000), shall be punished, upon conviction of two or more felonies in a single criminal proceeding, in addition and consecutive to the punishment prescribed for the felony offenses of which he or she has been convicted, by an additional term of imprisonment in the state prison as specified in paragraph (2) or (3). This enhancement shall be known as the aggravated white collar crime enhancement. The aggravated white collar crime enhancement shall only be imposed once in a single criminal proceeding. For purposes of this section, 'pattern of related felony conduct' means engaging in at least two felonies that have the same or similar purpose, result, principals, victims, or methods of commission, or are otherwise interrelated by distinguishing characteristics, and

that are not isolated events. For purposes of this section, "two or more related felonies" means felonies committed against two or more separate victims, or against the same victim on two or more separate occasions.

**California Penal Code section 186.11(a)(2):** If the pattern of related felony conduct involves the taking of, or results in the loss by another person or entity of, more than five hundred thousand dollars ($500,000), the additional term of punishment shall be two, three, or five years in the state prison.

**California Penal Code section 484(a):** Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him or her, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his or her wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft.

**California Penal Code section 487(a).** Grand theft is theft committed ... when the money, labor, or real or personal property taken is of a value exceeding four hundred dollars ($400)...

**California Penal Code section 489(a):** Grand theft is punishable .... by imprisonment ... in the state prison.

**California Penal Code section 496(a):** Every person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained, shall be punished by imprisonment in a state prison....

**California Penal Code section 654(a):** An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other.

**California Penal Code section 1170:**

**(a)(3)** In any case in which the punishment prescribed by statute for a person convicted of a public offense is a term of imprisonment in the state prison of any specification of three time periods, the court shall sentence the defendant to one of the terms of imprisonment specified... In sentencing the convicted person, the court shall apply the sentencing rules of the Judicial Council.

(b) When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court. At least four days prior to the time set for imposition of judgment, either party or the victim, or the

family of the victim if the victim is deceased, may submit a statement in aggravation or mitigation. In determining the appropriate term, the court may consider the record in the case, the probation officer's report, other reports including reports received pursuant to Section 1203.03 and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, or the family of the victim if the victim is deceased, and any further evidence introduced at the sentencing hearing. The court shall select the term which, in the court's discretion, best serves the interests of justice. The court shall set forth on the record the reasons for imposing the term selected and the court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law. A term of imprisonment shall not be specified if imposition of sentence is suspended.

**former California Penal Code section 1170:**

(a)....(3) In any case in which the punishment prescribed by statute for a person convicted of a public offense is a term of imprisonment in the state prison of any specification of three time periods, the court shall sentence the defendant to one of the terms of imprisonment specified... In sentencing the convicted person, the court shall apply the sentencing rules of the Judicial Council.....

(b) When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime. At least four days prior to the time set for imposition of judgment, either party or the victim, or the family of the

victim if the victim is deceased, may submit a statement in aggravation or mitigation to dispute facts in the record or the probation officer's report, or to present additional facts. In determining whether there are circumstances that justify imposition of the upper or lower term, the court may consider the record in the case, the probation officer's report, other reports including reports received pursuant to Section 1203.03 and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, or the family of the victim if the victim is deceased, and any further evidence introduced at the sentencing hearing. The court shall set forth on the record the facts and reasons for imposing the upper or lower term. The court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law. A term of imprisonment shall not be specified if imposition of sentence is suspended.

**California Penal Code section 12022.1.**

(a) For the purposes of this section only:

(1) "Primary offense" means a felony offense for which a person has been released from custody on bail or on his or her own recognizance prior to the judgment becoming final, including the disposition of any appeal, or for which release on bail or his or her own recognizance has been revoked. In cases where the court has granted a stay of execution of a county jail commitment or state prison commitment, "primary offense" also means a felony offense for which a person is out of custody during the period of time between the pronouncement of judgment and the time the person

actually surrenders into custody or is otherwise returned to custody.

(2) "Secondary offense" means a felony offense alleged to have been committed while the person is released from custody for a primary offense.

(b) Any person arrested for a secondary offense which was alleged to have been committed while that person was released from custody on a primary offense shall be subject to a penalty enhancement of an additional two years in state prison which shall be served consecutive to any other term imposed by the court.

## California Rules of Court

**California Rules of Court 4.420. Selection of base term of imprisonment:**

(a) When a sentence of imprisonment is imposed, or the execution of a sentence of imprisonment is ordered suspended, the sentencing judge shall select the upper, middle, or lower term on each count for which the defendant has been convicted, as provided in section 1170(b) and these rules. The middle term shall be selected unless imposition of the upper or lower term is justified by circumstances in aggravation or mitigation.

(b) Circumstances in aggravation and mitigation shall be established by a preponderance of the evidence. Selection of the upper term is justified only if, after a consideration of all the relevant facts, the circumstances in aggravation

outweigh the circumstances in mitigation. The relevant facts are included in the case record, the probation officer's report, other reports and statements properly received, statements in aggravation or mitigation, and any further evidence introduced at the sentencing hearing. Selection of the lower term is justified only if, considering the same facts, the circumstances in mitigation outweigh the circumstances in aggravation.

(c) To comply with section 1170(b), a fact charged and found as an enhancement may be used as a reason for imposing the upper term only if the court has discretion to strike the punishment for the enhancement and does so. The use of a fact of an enhancement to impose the upper term of imprisonment is an adequate reason for striking the additional term of imprisonment, regardless of the effect on the total term.

(d) A fact that is an element of the crime shall not be used to impose the upper term.

(e) The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected.

**California Rules of Court 4.421:** Circumstances in aggravation include factors relating to the crime and factors relating to the defendant.

(a) Factors relating to the crime....

(4) The defendant induced others to participate in the commission of the crime or occupied a position of leadership or dominance of other participants in its commission....

(8) The manner in which the crime was carried out indicates planning, sophistication, or professionalism;

(9) The crime involved an attempted or actual taking or damage of great monetary value;

(10) The crime involved a large quantity of contraband; and

(11) The defendant took advantage of a position of trust or confidence to commit the offense.

(b) Factors relating to the defendant

Factors relating to the defendant include that:

(1) The defendant has engaged in violent conduct that indicates a serious danger to society;

(2) The defendant's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are numerous or of increasing seriousness;

(3) The defendant has served a prior prison term;

(4) The defendant was on probation or parole when the

crime was committed; and

(5) The defendant's prior performance on probation or parole was unsatisfactory.

**California Rules of Court 4.425. Criteria affecting concurrent or consecutive sentences:**
Criteria affecting the decision to impose consecutive rather than concurrent sentences include...

(b) Other criteria and limitations: Any circumstances in aggravation or mitigation may be considered in deciding whether to impose consecutive rather than concurrent sentences, except:

(1) A fact used to impose the upper term;

(2) A fact used to otherwise enhance the defendant's prison sentence; and

(3) A fact that is an element of the crime may not be used to impose consecutive sentences.

## STATEMENT OF THE CASE

### 1. Statement of the Case

Petitioner was charged with two counts of conspiracy (Counts 1 and 11), California Penal Code section 182(a)(1), one count of possession of stolen property (Count 10), California Penal Code section 496, eleven counts of grand theft, (Counts 2-9 and 12-14), California Penal Code section 487(a), and four

enhancements, of which two were significant – aggravated white collar crime, California Penal Code section 186.11(a)(1) and (2)[1], and an offense committed while released on bail, California Penal Code section 12022.1. (CT 413-420.) Following a jury trial, petitioner was convicted.

On January 5, 2006, the superior court sentenced petitioner to 14 years, eight months based the following calculation:

| | | |
|---|---|---|
| base | Count 5, grand theft | 3 year aggravated term |
| | Count 2, grand theft | 8 months (⅓ midterm) |
| | Count 3, grand theft | 8 months (⅓ midterm) |
| | Count 4, grand theft | 8 months (⅓ midterm) |
| | Count 6, grand theft | 8 months (⅓ midterm) |
| | Count 7, grand theft | 8 months (⅓ midterm) |
| | Count 8, grand theft | 8 months (⅓ midterm) |

[1] The other two enhancements were essentially lesser versions of section 186.11(a)(1) and (2).

| | |
|---|---|
| Count 10, possession of stolen property | 8 months (⅓ midterm) |
| Count 12, grand theft | no additional time |
| Count 13, grand theft | 8 months (⅓ midterm) |
| Count 14, grand theft | 8 months (⅓ midterm) |
| Count 1, conspiracy | Stayed per California Penal Code section 654 |
| Count 11, conspiracy | 8 months (⅓ midterm) |
| enhancement section 12022.1 | 2 years |
| enhancement section 186.11(a)(1) & (2) | 3 years |
| Total | 14 years, 8 months |

(Clerk's Transcript ("CT") 547-549.)

**2. Statement of Facts**

**a. Main trial.**

This case involved ongoing actions of petitioner and Willard

Rankins to cash counterfeit checks from various banks using agents to present the checks to the banks. Willard Rankins had previously been convicted in a separate trial.

Four individuals -- Claudia Bass (Reporter's Transcript ("RT.") 1076-1138), April McGlothen (RT. 1157-1176), Lakeisha Clark (RT. 1227-1229), and Kenya Ussery (RT. 2926-2952) testified that they and others had cashed or attempted to cash counterfeit checks for petitioner by presenting them at various banks.

Various witnesses from businesses whose checks had been counterfeited identified checks as counterfeit – checks identified were written to 37 different people.

A supplier of check paper testified that petitioner had ordered paper for printing checks. (RT. 3532-3555.)

A search of petitioner's home resulted in the seizure of four computers and some check exemplars. (RT. 1484-1486.) Analysis of the computers revealed software for creating and printing blank checks (RT. 3008-3010), records of 6,000 separate checks printed on one computer and about 1,600 on another (RT. 3010), and deleted images of checks. (RT. 3031.)

Petitioner's fingerprints were found on some of the recovered counterfeit checks. (RT. 2824.)

A fraud investigator for Washington Mutual Bank testified that many deposits and withdrawals of more than $1,000 had been made into and from an account under the name of "Pamela Lee", an alias of petitioner's, and that several

counterfeit checks had also been deposited into that account. (RT. 3757 - 3762).

Petitioner did not testify in the case in chief. However, prison authorities intercepted a letter from petitioner to her husband and co-conspirator Willard Rankins that arguably asked him to testify falsely that he was completely responsible for the check-passing activities and that petitioner had little or nothing to do with the scheme. (CT 361-362.)

Willard Rankins was called as a defense witness but asserted his Fifth Amendment privilege against self-incrimination. (RT. 3890.) Three other witnesses testified that petitioner was self-employed in a day care business during the period of time at issue (RT. 3909, 3986 to 3988), that petitioner had not been seen using a computer or printing checks (RT. 3911), and that Willard Rankins typically told petitioner what to do and would hit her on occasion (RT. 3943, 3948.)

The jury convicted petitioner of all charges on August 25, 2001.

**b. Second trial on sentencing factors**

Following the conclusion of the defense case, but prior to closing argument, the court advised counsel that, in an attempt to comply with *Blakely v. Washington*, it intended to have a bifurcated trial to have the jury make findings on aggravating factors, should the jury convict the defendants. (RT. 4080-4081.)

After the jury returned its verdict, on August 25, 2005, the court announced that it was going to hold the bifurcated trial.

(RT. 4339, 4342.) Petitioner's counsel requested a continuance to prepare, which was denied. (RT. 4341.) The court submitted the following sentencing factors to the jury:

1. Petitioner induced others to participate in the commission of the crimes.

2. The manner in which the crimes were carried out indicates planning, sophistication, or professionalism.

3. The crimes involved an attempted or actual taking or damage of great monetary value.

4. The crimes involved a large quantity of contraband.

5. The crimes involved the abuse of a trusted position. (RT 4498.)

Defense counsel did not ask the court to instruct on any defenses to these factors, such as duress, and the court did not do so. Defense counsel then made an opening statement telling the jury that she was going to show that petitioner was a victim of abuse, a pawn, and not the mastermind of the crimes for which she was convicted, and that she had done what she had done upon "punishment of being hit, scared, and beaten." (RT. 4349.)

Defense counsel called petitioner to testify. Petitioner testified that before she married Rankins, she discovered that he didn't have a job, was a "pimp", used women for what they would do for him, and had about 10 women working for him. Rankins hit her and beat her on various occasions. (RT. 4362

and 4363.) Petitioner testified that she worked at several different companies from July 2001 to May 2004, while Rankins did not work. (RT. 4375.) She denied knowledge of checks found during the search of her house and denied having anything to do with the check passing scheme. (RT. 4383-4384.)

On cross-examination, petitioner admitted, that she had been convicted of welfare fraud and depositing a forged check into her bank account in 1999. (RT. 4470-4472.) She did not tell her probation officer that her former husband Tolliver, who was deceased at the time of the probation report, was involved in a forgery ring, (RT. 4473), and denied running the previous forgery ring. (RT. 4475.) She also admitted that she had applied for driver's licenses under four different names. (RT. 4475.) Concerning the letter to Rankins that prison officials had intercepted, petitioner alternatively testified that the handwriting wasn't hers, that someone had written it for her, and that someone had been writing to Rankins impersonating her. (RT. 4479 and 4480.)

In closing, defense counsel only addressed the issue of whether petitioner had personally exercised sophistication and planning. (RT. 4497.)

The jury found all 5 sentencing factors true, beyond a reasonable doubt.

### c. Sentencing

At sentencing, the court relied on three additional sentencing factors that had not been submitted to the jury –

a. that petitioner had attempted to suborn perjury by writing the letter to her husband Rankins in jail,

b. that petitioner had been on probation at the time she committed the offense, and

c. that her past convictions had been of increasing seriousness.

The court recognized that these factors had not be submitted to the jury, but decided that the law did not require these factors (or apparently, any others) to be submitted to the jury. (RT. 4531.)

The court relied primarily on factors "a" and "b", two of the three factors not submitted to the jury, in imposing the aggravated term for Count 5. The court relied primarily on the "abuse of a position of trust" factor that had been submitted to the jury to impose consecutive sentences on counts 2, 3, 4, 6, 7, 8, 9, 10, 12, 13, and 14. (RT. 4531-4532.)

**3. Direct appeal in State courts.**

The California Court of Appeal affirmed petitioner's convictions and sentence. Petitioner's discretionary petition for review was denied by the California Supreme Court on January 3, 2008.

## ARGUMENT

### 1. This Court has already granted certiorari on the issue of whether the imposition of consecutive sentences falls within the *Apprendi/Blakeley* rule.

In *Oregon v. Ice*, No. 07-901 (March 17, 2008), 2008 U.S. LEXIS 2387; 76 U.S.L.W. 3496, this Court granted certiorari from the Oregon Supreme Court's opinion in *State v. Ice*, 343 Ore. 248, 170 P.3d 1049 (2007) on the following question:

> "Whether the Sixth Amendment, as construed in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), requires that facts (other than prior convictions) necessary to imposing consecutive sentences be found by the jury or admitted by the defendant."

In *State v. Ice*, the Oregon Supreme Court construed a sentencing scheme very similar to California's and held that imposition of consecutive sentences under that scheme were subject to the requirements of the Sixth Amendment that facts necessary to impose such sentences had to be found by a jury or admitted by the defendant. The Oregon Supreme Court stated the issue as follows:

> "In *United States v. Booker*, 543 U.S. 220, 236, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005), the Court explained its rationale for adopting the foregoing rule. First, it noted that, with the advent of determinate sentencing schemes, it had been forced to consider 'the significance

of facts selected by legislatures that * * * increased the range of sentences possible for the underlying crimes.' Under sentencing schemes that permitted trial judges to impose a sentence that exceeded the statutory maximum for an offense, based on finding certain sentencing factors, '[i]t became the judge, not the jury, who determined the upper limits of sentencing, and the facts determined were not required to be raised before trial or proved by more than a preponderance' of the evidence. Id. The Court then explained that it had issued its holdings in *Apprendi* and *Blakely* in response to this 'new sentencing practice.' Id. at 237. The Court reasoned:

> 'As it thus became clear that sentencing was no longer taking place in the tradition [of judicial discretion in sentencing] that Justice Breyer invokes [in his dissenting opinion], the Court was faced with the issue of preserving an ancient guarantee [to trial by jury] under a new set of circumstances. The new sentencing practice forced the Court to address the question how the right of jury trial could be preserved in a meaningful way guaranteeing that the jury would still stand between the individual and the power of the government under the new sentencing regime. And it is the new circumstances, not a tradition or practice that the new circumstances have superseded, that have led [the Court] to the answer first considered in *Jones [v. United States*, 526 U.S. 227, 119 S. Ct. 1215, 143 L. Ed. 2d 311, 67 U.S.L.W. 4204 (1999)] and developed

> in *Apprendi* and subsequent cases culminating with this one.'
>
> *Id.* (emphasis added). We believe that the foregoing statement from *Booker* makes it inescapably clear that the rule in *Apprendi* and *Blakely* is not directed at the traditional discretion of judges to select a sentence within a range that the legislature has selected and the jury's verdict determines, but at sentencing schemes that permit or require judges to impose sentences that are longer than sentences that a jury's verdict alone would authorize. Obviously, in the context of that concern, it does not matter that a factual determination is of a type that traditionally has been made by judges in the exercise of their sentencing discretion. The concern is with facts that increase a defendant's sentence beyond the prescribed maximum for the crime that the jury determined [30] that the defendant committed. Under *Apprendi, Blakely*, and their progeny, those facts must themselves be decided by a jury."

*State v. Ice*, 343 Ore. at 264-265, 170 P.3d at 1057. Because this case presents the same issue as *State v. Ice*, cert. granted in *Oregon v. Ice*, this Court should also grant certiorari for petitioner on that issue.

**2. There is a conflict between various state courts, including the California Supreme Court, on the issue of whether the Sixth Amendment applies to imposition of consecutive sentences.**

As noted in *State v. Ice*, 170 P.3d at 1058-1059, several

other state courts, including the California Supreme Court, have held that the Sixth Amendment does not apply to the imposition of consecutive sentences. These include *State v. Cubias*, 155 Wn. 2d 549, 120 P.3d 929 (2005); *People v. Black*, 41 Cal 4th 799, 62 Cal. Rptr. 3d 569, 161 P.3d 1130 (2007) ("*Black II*"); *People v. Wagener*, 196 Ill. 2d 269, 752 N.E.2d 430, 256 Ill. Dec. 550, cert den sub nom, *Wagener v. Illinois*, 534 U.S. 1011, 122 S. Ct. 498, 151 L. Ed. 2d 408 (2001). Since California is one of the states that is in conflict with the holding in *State v. Ice*, this Court should grant certiorari to resolve the conflict.

### 3. California has attempted to avoid this Court's decision in *Cunningham v. California* regarding the imposition of aggravated terms by attempting to recast California's determinate sentencing law as "discretionary." This involves an important question of Federal law that this court should grant certiorari to resolve.

In *Cunningham v. California*, this Court held that California's method of imposing the aggravated term under its determinate sentencing law violated the Sixth Amendment, as construed by *Apprendi* and *Blakely*. California has attempted to avoid *Cunningham* in two ways:

#### a. "Recidivism factor" exception

a. In *Black II*, the California Supreme Court held that any facts concerning recidivism fell outside of *Cunningham*, stating that *Cunningham's* exception for prior convictions includes "not only the fact that a prior conviction occurred, but also

other related issues that may be determined by examining the records of the prior convictions." *Black II*, 41 Cal. 4th at p. 819. However, in *Cunningham*, this Court considered and rejected the claim that the exception for priors is broader than the mere fact of the prior conviction itself. In his dissent in *Cunningham*, Justice Kennedy wrote:

> "The Court could distinguish between sentencing enhancements based on the nature of the offense, where the *Apprendi* principle would apply, and sentencing enhancements based on the nature of the offender, where it would not. California attempted to make this initial distinction. Compare Cal. Rule of Court 4.421(a) (Criminal Cases) (West 2006) (listing aggravating [f]acts relating to the crime), with Rule 4.421(b) (listing aggravating [f]acts relating to the defendant). The Court should not foreclose its efforts."

*Cunningham v. California*, 127 S.Ct. 856, 872. The majority in Cunningham held, in response to Justice Kennedy's objection:

> "Justice KENNEDY urges a distinction between facts concerning the offense, where *Apprendi* would apply, and facts concerning the offender, where it would not. Post, at 872 (dissenting opinion). *Apprendi* itself, however, leaves no room for the bifurcated approach Justice KENNEDY proposes. See 530 U.S., at 490, 120 S.Ct. 2348 ("'[A]ny fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'"

*Cunningham v. California*, 127 S.Ct. at 869, fn. 14, quoting *Apprendi*.

As four of the five "facts relating to the offender" California Rules of Court 4.421(b) are recidivism factors ("increasing seriousness" of prior convictions, prior prison terms, offense committed during a prior term of probation or parole, unsatisfactory performance under prior probation and parole terms), this Court clearly held that at least these particular recidivism factors did not fall within an exception to *Cunningham*.

**b. Recasting sentencing scheme as "discretionary."**

In 2007, the California Legislature amended California Penal Code section 1170, subdivisions (a)(3), and (b), to give the sentencing court discretion to award one of the three sentencing choices in the determinate sentencing range, with no presumption of the middle term. In *People v. Sandoval,* 41 Cal. 4th 825, 161 P.3d 1146; 62 Cal. Rptr. 3d 588 (2007), the California Supreme Court added a court created remedy for defendants sentenced before the Legislature amended section 1170 that was essentially the same as the Legislative amendment, that on remand, the sentencing court would resentence as a matter of discretion and could consider any fact that it relied on before.

The new sentencing scheme still violates Cunningham, since there is essentially no change except to eliminate the presumption of the midterm. As this Court pointed out in *Cunningham*:

> "California's DSL does not resemble the advisory system the *Booker* Court had in view. Under California's system, judges are not free to exercise their 'discretion to select a specific sentence within a defined range.' *[United States v.] Booker,* 543 U.S. [220], at 233, 125 S. Ct. 738, 160 L. Ed. 2d 621 [(2005)]. California's Legislature has adopted sentencing triads, three fixed sentences with no ranges between them. Cunningham's sentencing judge had no discretion to select a sentence within a range of 6 to 16 years. His instruction was to select 12 years, nothing less and nothing more, unless he found facts allowing the imposition of a sentence of 6 or 16 years."

*Cunningham v. California*, 127 S. Ct. at 875. Under California's revised determinate sentencing law, the sentencing court may still only choose between a mitigated term, mid-term, and aggravated term for any particular offense. The California Rules of Court still set forth the permissible bases for trial courts to impose aggravated terms and consecutive sentences, so the "reasons" sentencing courts will be considering are the same they considered before, those set forth in the California Rules of Court.

As this Court further held in *Cunningham,* the California Supreme Court could not avoid the Sixth Amendment by simply providing for review on a "reasonableness" basis, as it attempted to do in *People v. Black*, 35 Cal. 4th 1238, 29 Cal. Rptr. 3d 740, 113 P.3d 534 (2005) ("*Black I*"):

> "The *Black [I]* court attempted to rescue the DSL's judicial fact-finding authority by typing it simply a

> reasonableness constraint, equivalent to the constraint operative in the federal system post-*Booker*... Reasonableness, however, is not, as the *Black [I]* court would have it, the touchstone of Sixth Amendment analysis. The reasonableness requirement *Booker* anticipated for the federal system operates within the Sixth Amendment constraints delineated in our precedent, not as a substitute for those constraints. Because the DSL allocates to judges sole authority to find facts permitting the imposition of an upper term sentence, the system violates the Sixth Amendment. It is comforting, but beside the point, that California's system requires judge-determined DSL sentences to be reasonable. *Booker's* remedy for the Federal Guidelines, in short, is not a recipe for rendering our Sixth Amendment case law toothless."

*Cunningham v. California*, 127 S. Ct. at 875-876.

In essence, California has done what the U.S. Supreme Court said that it could not do – simply kept the existing sentencing system (minus any presumption of the midterm) and substituted reasonableness review for the requirements of the Sixth Amendment.)

**4. As the sentencing court did not have authority under California law to convene an ad hoc jury on sentencing factors, it makes no difference that jurors may have found some of the factors the sentencing court relied on in imposing consecutive sentences.**

The sentencing court did not cure the problem by submitting some of the aggravating factors to the jury. This court specifically recognized in *Cunningham* specifically recognized that California lacked any lawful procedure for determining aggravating factors and that the state would have to alter its system to either provide for jury determination of such factors or to permit judges genuinely "to exercise broad discretion."

> "As to the adjustment of California's sentencing system in light of our decision, "the ball . . . lies in [California's] court." *Booker*, 543 U.S., at 265, 125 S. Ct. 738, 160 L. Ed. 2d 621; cf. supra, at 15. We note that several States have modified their systems in the wake of *Apprendi* and *Blakely* to retain determinate sentencing. They have done so by calling upon the jury -- either at trial or in a separate sentencing proceeding -- to find any fact necessary to the imposition of an elevated sentence. As earlier noted, California already employs juries in this manner to determine statutory sentencing enhancements.... Other States have chosen to permit judges genuinely 'to exercise broad discretion . . . within a statutory range,' which, 'everyone agrees,' encounters no Sixth Amendment shoal. *Booker*, 543 U.S., at 233, 125 S. Ct. 738, 160 L. Ed. 2d 621. California may follow

> the paths taken by its sister States or otherwise alter its system, so long as the State observes Sixth Amendment limitations declared in this Court's decisions."

*Cunningham v. California*, 127 S. Ct. at 876.

In *People v. Sandoval*, the California Supreme Court agreed that a sentencing court, in an attempt to comply with *Blakely*, could not simply create its own sentencing procedure of submitting questions to a jury:

> "Although such a process would comply with the constitutional requirements of *Cunningham*, engrafting a jury trial onto the sentencing process established in the former DSL would significantly complicate and distort the sentencing scheme. Neither the DSL nor the Judicial Council's sentencing rules were drafted in contemplation of a jury trial on aggravating circumstances. It is unclear how prosecutors might determine which aggravating circumstances should be charged and tried to a jury, because no comprehensive list of aggravating circumstances exists."

*People v. Sandoval*, 41 Cal.4th at 848. Thus, that the trial court did attempt to create its own sentencing jury in this case would not make any difference, as its actions were unauthorized under California law.

## CONCLUSION

For the above reasons, this honorable Court should grant certiorari in this case.

Dated: Oakland, California, Monday, March 24, 2008.

Robert Joseph. Beles

Paul Gilruth McCarthy
Attorneys for *Petitioner*
*SONYA DENIECE RANKIN*

## APPENDIX

Filed 10/26/07 P. v. Rankin CA1/1

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

| | |
|---|---|
| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br>SONYA DENIECE RANKIN,<br><br>Defendant and Appellant. | A11263<br><br>(Alameda County Superior Court No. 149280A)<br><br>MEMORANDUM OPINION |

This case raises a sentencing issue arising from a large-scale conspiracy to cash counterfeit checks.

A jury convicted defendant Sonya Deniece Rankin of two

counts of conspiracy (Pen. Code, § 182, subd. (a)(1));[2] 10 counts of grand theft (§ 487, subd. (a)); and one count of possession of stolen property (§ 496). The jury found that the loss was over $150,000 within the meaning of section 12022.6, subdivisions (a)(2) and (b), and over $100,000 within the meaning of section 1203.045, subdivision (a). The jury further found that the crimes involved a pattern of fraudulent conduct and a taking of over $500,000 (§ 186.11, subds. (a)(1), (2)), and that defendant was out on bail when she committed four of the crimes (§ 12022.1).

Defendant was sentenced to the upper term on one count of grand theft, count 5, and to consecutive sentences of eight months on all but one of the remaining counts of grand theft and on the count of possession of stolen property. The trial court stayed the sentences on the conspiracy counts pursuant to section 654. With enhancements, defendant's total sentence is fourteen years eight months.

In imposing the upper term on count 5, the trial court relied on nine aggravating factors: five found by the jury and four found by the court. The jury found that (1) defendant induced others to participate in the crime or occupied a position of leadership or dominance; (2) the manner in which the crime was carried out indicated planning, sophistication, or professionalism; (3) the crime involved a substantial loss of money; (4) the crime involved a large quantity of contraband; and (5) the crime involved an abuse of trust. The court found that (6) defendant had suborned perjury; (7) defendant's prior convictions were of increasing seriousness; (8) defendant was

---

[2] Subsequent statutory citations are to the Penal Code.

on probation at the time of the offense; and (9) defendant's prior performance on probation was poor.

The appellant's opening brief and the respondent's brief were filed before July 19, 2007, when the California Supreme Court decided *People v. Black* (2007) 41 Cal.4th 799 (*Black II*) and *People v. Sandoval* (2007) 41 Cal.4th 825 (*Sandoval*). In her reply brief, defendant concedes that *Black II* rejects her two contentions on appeal, and that we are bound by *Black II*.

**1.** Defendant contends that her upper term was imposed in violation of *Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856, 166 L.Ed.2d 856] (*Cunningham*) and *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*). But the upper term was justified by an aggravating factor based on recidivism, which falls outside the constitutional requirements of these two cases.

In *Black II*, the court held: "Under California's determinate sentencing system, the existence of a single aggravating circumstance is legally sufficient to make the defendant eligible for the upper term. [Citation.] Therefore, if one aggravating circumstance has been established in accordance with the constitutional requirements set forth in *Blakely*, the defendant is not 'legally entitled' to the middle term sentence, and the upper term sentence is the 'statutory maximum.' " (*Black II, supra,* 41 Cal.4th at p. 813.)

In other words, if there is a single aggravating circumstance which satisfies *Blakely*, "any additional factfinding engaged in by the trial court in selecting the appropriate sentence among the three available options does not violate the defendant's right to [a] jury trial." (*Black II,*

*supra*, 41 Cal.4th at p. 812.)

The *Black II* court further held, consistent with existing authorities, that a defendant's criminal history—including the increasing seriousness of her prior convictions—qualifies under the recidivism exception to *Blakely*. (*Black II, supra*, 41 Cal.4th at pp. 818-820.)

Thus, the aggravating factor based on the increasing seriousness of defendant's prior convictions was properly found by the court and, under *Black II*, is sufficient to justify the upper term.

**2.** Defendant also contends that her consecutive sentences were imposed in violation of *Cunningham*. But *Black II* makes it clear that *Cunningham* does not apply to consecutive sentencing. (*Black II, supra*, 41 Cal.4th at pp. 820-823.)

Defendant's upper term and consecutive sentences are appropriate. Defendant's argument that *Sandoval* invalidates jury-determined aggravating circumstances is moot.

The judgment and sentence are affirmed.

_____

Marchiano, P.J.

We concur:

_____

Stein, J.

_____

Swager, J.

THE PEOPLE, Plaintiff and Respondent,

v.

SONYA DENIECE RANKIN, Defendant and Appellant.

S158642

SUPREME COURT OF CALIFORNIA

2008 Cal. LEXIS 80

January 3, 2008, Filed

PRIOR HISTORY:
First Appellate District, Div. 1, No. A112663.

JUDGES: GEORGE, Chief Justice.

OPINION

Petition for review denied.

Werdegar, J., was absent and did not participate.

94

No. 07-1249 (2)

FILED
JUN 2 - 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

# In the Supreme Court of the United States

SONYA DENIECE RANKIN, *Petitioner,*

v.

CALIFORNIA, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
GERALD A. ENGLER
Senior Assistant Attorney General
DONALD E. DE NICOLA
Deputy State Solicitor General
STAN HELFMAN
Supervising Deputy Attorney General
LAURENCE K. SULLIVAN
Supervising Deputy Attorney General
JEFFREY M. LAURENCE
Deputy Attorney General
Counsel of Record
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5897
E-mail: Jeff.Laurence.doj.ca.gov
Counsel for Respondent

## QUESTIONS PRESENTED

1. Did the California Court of Appeal misapply *Cunningham* v. *California*, 549 U.S. 270 (2007), *United States* v. *Booker*, 543 U.S. 220 (2005), *Blakely* v. *Washington*, 542 U.S. 296 (2004), and *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), by concluding that the discretionary decision whether to run sentences on multiple counts consecutively rather than concurrently does not violate the right to jury trial where, under California state law, there is no presumption of concurrent sentencing and no requirement of judicial factfinding to impose a consecutive sentence?

2. Did the California Court of Appeal misapply the recidivism exception to the jury trial requirement for prior convictions as set out in *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998), by holding that the trial court could properly find whether a defendant's convictions were increasingly serious?

3. Did the California Supreme Court in *People* v. *Sandoval*, 41 Cal. 4th 825, 161 P.3d 1146, 62 Cal. Rptr. 3d 588 (2007), violate petitioner's federal constitutional right to be free from ex post facto legislation by judicially reforming California Penal Code section 1170(b) to eliminate the requirement that a trial court find an additional fact in order to impose an upper term, and directing trial courts to conduct *Cunningham* resentencings under this reformed system, even though petitioner was never sentenced under this reformed system?

## TABLE OF CONTENTS

Page

ARGUMENT ..... 3

I. PETITIONER ENJOYED THE RIGHT TO A JURY TRIAL AND PROOF BEYOND A REASONABLE DOUBT FOR THE AGGRAVATING CIRCUMSTANCE THAT SERVED AS A CONSTITUTIONALLY VALID BASIS FOR IMPOSITION OF CONSECUTIVE TERMS ..... 3

II. THE JURY'S FINDING OF FIVE AGGRAVATING FACTORS AND THE PRESENCE OF RECIDIVISM FACTORS AUTHORIZED THE TRIAL COURT TO IMPOSE THE UPPER TERM ..... 11

A. Reliance On Recidivism Factors Does Not Violate The Sixth Amendment ..... 12

B. Petitioner's Challenge To California's Reformed Sentencing System Is Not Justiciable ..... 18

CONCLUSION ..... 21

## TABLE OF AUTHORITIES

**Page**

**Cases**

*Aetna Life Ins. Co. of Hartford, Conn.* v. *Haworth*, 300 U.S. 227 (1937) ..... 18, 19

*Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998) ..... 12-16

*Anderson* v. *Green*, 513 U.S. 557 (1995) ..... 19

*Apprendi* v. *New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) ..... 3, 5, 12, 13, 17

*Barragan* v. *Superior Court*, 148 Cal. App. 4th 1478, 56 Cal. Rptr. 3d 660 (2007) ..... 7

*Blakely* v. *Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) ..... 3, 5, 8-13, 17, 18

*Cunningham* v. *California*, 549 U.S. 270, 127 S. Ct. 856 (2007) ..... 6-9, 11-13, 16-18

*Harris* v. *United States*, 536 U.S. 545 (2007) ..... 17

*In re Carlos B.*, 76 Cal. App. 4th 50, 90 Cal. Rptr. 2d 72 (1999) ..... 5

*In re Pers. Restraint of VanDelft*, 147 P.3d 573 (Wash. 2006) ..... 10

## TABLE OF AUTHORITIES (continued)

Page

*James* v. *United States*, 127 S. Ct. 1586 (2007) ..... 13

*Mullaney* v. *Wilbur*, 491 U.S. 684 (1975) ..... 8

*Ohio Forestry Association, Inc.* v. *Sierra Club*, 523 U.S. 726 (1998) ..... 19

*Oregon* v. *Ice*, 128 S. Ct. 1657 (2008) ..... 3

*People* v. *Black*, 41 Cal. 4th 799, 161 P.3d 1130, 62 Cal. Rptr. 3d 569 (2007) ..... 8, 9, 11, 13, 15-17

*People* v. *Chew Lang Ong*, 141 Cal. 550, 75 P. 186 (1904) ..... 7

*People* v. *Hyde*, 49 Cal. App. 3d 97, 122 Cal. Rptr. 297 (1975) ..... 7

*People* v. *Jordan*, 65 Cal. 644, 4 P. 683 (1884) ..... 6

*People* v. *Osband*, 13 Cal. 4th 622, 919 P.2d 640, 55 Cal. Rptr. 2d 26 (1996) ..... 17

*People* v. *Reeder*, 152 Cal. App. 3d 900, 200 Cal. Rptr. 479 (1984) ..... 8

*People* v. *Sandoval*, 41 Cal. 4th 825, 161 P.3d 1146, 62 Cal. Rptr. 3d 588 (2007) ..... 7, 9, 16, 19, 20

*People* v. *Walker*, 33 Cal. 2d 250, 201 P.2d 6 (1949) ... 7

## TABLE OF AUTHORITIES (continued)


| | Page |
|---|---|
| *Rangel-Reyes* v. *United States*, 126 S. Ct. 2873 (2006) | 13 |
| *Ring* v. *Arizona*, 536 U.S. 584 (2002) | 9 |
| *Rita* v. *United States*, 127 S. Ct. 2456 (2007) | 13, 17 |
| *Rogers* v. *Tennessee*, 532 U.S. 451 (2001) | 19, 20 |
| *Ryle* v. *State*, 842 N.E.2d 320 (Ind. 2005) | 14 |
| *Smylie* v. *State*, 823 N.E.2d 679 (Ind. 2005) | 10 |
| *Sommerville* v. *United States*, 376 U.S. 909 (1964) | 18 |
| *State* v. *Abdullah*, 878 A.2d 746 (N.J. 2005) | 10 |
| *State* v. *Allen*, 706 N.W.2d 40 (Minn. 2005) | 14 |
| *State* v. *Cubias*, 120 P.3d 929 (Wash. 2005) | 10 |
| *State* v. *Fagan*, 905 A.2d 1101 (Conn. 2006) | 14 |
| *State* v. *Foster*, 845 N.E.2d 470 (Ohio 2006) | 11 |
| *State* v. *Ice*, 170 P.3d 1049 (Ore. 2007) | 10 |
| *State* v. *Jacobs*, 644 N.W.2d 695 (Iowa 2001) | 10 |
| *State* v. *Jones*, 149 P.3d 636 (Wash. 2006) | 14 |
| *State* v. *Keene*, 927 A.2d 398 (Me. 2007) | 11 |

## TABLE OF AUTHORITIES (continued)


Page

*State* v. *Stewart*, 791 A.2d 143 (Md. 2002) ..... 14

*Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83 (1998) ..... 18

*Telegram Tribune, Inc.* v. *Municipal Court (Rose)*, 166 Cal. App. 3d 1072, 213 Cal. Rptr. 7 (1985) ..... 6

*United States* v. *Booker*, 543 U.S. 220 (2005) ..... 9, 13, 19, 20

*United States* v. *Campbell*, 279 F.3d 392 (6th Cir. 2002) ..... 10

*United States* v. *Chorin*, 322 F.3d 274 (3rd Cir. 2003) ..... 10

*United States* v. *Corchado*, 427 F.3d 815 (10th Cir. 2005) ..... 14

*United States* v. *Fagans*, 406 F.3d 138 (2d Cir. 2005) ..... 13

*United States* v. *Feola*, 275 F.3d 216 (2d Cir. 2001) .. 10

*United States* v. *Fifield*, 432 F.3d 1056 (9th Cir. 2005) ..... 9, 10

*United States* v. *Harrison*, 340 F.3d 497 (8th Cir. 2003) ..... 10

## TABLE OF AUTHORITIES (continued)


| | Page |
|---|---|
| *United States* v. *Hernandez*, 330 F.3d 964 (7th Cir. 2003) | 10 |
| *United States* v. *Hicks*, 389 F.3d 514 (5th Cir. 2004) | 10 |
| *United States* v. *Kempis-Bonola*, 287 F.3d 699 (8th Cir. 2002) | 14 |
| *United States* v. *Lafayette*, 337 F.3d 1043 (D.C. Cir. 2003) | 10 |
| *United States* v. *Lata*, 415 F.3d 107 (1st Cir. 2005) | 20 |
| *United States* v. *Lott*, 310 F.3d 1231 (10th Cir. 2002) | 10 |
| *United States* v. *Pressley*, 345 F.3d 1205 (11th Cir. 2003) | 10 |
| *United States* v. *Santiago*, 268 F.3d 151 (2d Cir. 2001) | 13, 14 |
| *United States* v. *Smith*, 474 F.3d 888 (6th Cir. 2007) | 15, 16 |
| *Warth* v. *Seldin*, 422 U.S. 490 (1975) | 19 |

## TABLE OF AUTHORITIES (continued)


Page

**Constitutional Provisions**

United States Constitution
Sixth Amendment ..... 3, 5, 6, 9-12, 16

**Statutes**

18 U.S.C. § 3584 ..... 10

28 U.S.C. § 3553(c) ..... 9

California Penal Code
§ 18 ..... 2
§ 182(a)(1) ..... 1
§ 186.11(a)(1)-(2) ..... 1
§ 487(a) ..... 1
§ 489(b) ..... 2
§ 496 ..... 1
§ 669 ..... 8
§ 1203.045(a) ..... 1
§ 12022.1 ..... 1
§ 12022.6 ..... 1

## TABLE OF AUTHORITIES (continued)

Page

**Court Rules**

California Rules of Court
4.421(a)(4) ..... 1
4.421(a)(6) ..... 2
4.421(a)(8) ..... 1
4.421(a)(9) ..... 2
4.421(a)(10) ..... 2
4.421(a)(11) ..... 2
4.421(b)(2) ..... 2, 15
4.421(b)(4) ..... 2
4.421(b)(5) ..... 3

Rules of the Supreme Court of the United States
rule 10 ..... 12

**Other Authorities**

2 Witkin, California Procedure § 190 (4th ed. 1997) .. 7

R. Stern et al., Supreme Court Practice 247
(9th ed. 2007) ..... 16, 18

# In the Supreme Court of the United States

No. 07-1249

SONYA DENIECE RANKIN, *Petitioner,*

v.

CALIFORNIA, *Respondent.*

1. Petitioner, Sonya Rankin, was charged by information with two counts of conspiracy, Cal. Penal Code § 182(a)(1) (counts 1, 11), eleven counts of grand theft, Cal. Penal Code § 487(a) (counts 2-9, 12-14), and possession of stolen property, Cal. Penal Code § 496 (count 10). The information further alleged the offenses involved a pattern of fraudulent conduct and involved a taking of over $500,000, Cal. Penal Code §§ 186.11(a)(1)-(2)), 1203.045(a), 12022.6, and petitioner was on bail when she committed counts 11 through 14, Cal. Penal Code § 12022.1. (C.T. 413-20.)

Prior to the start of trial, the prosecution provided notice of five factors in aggravation to be proved to the jury for purpose of seeking upper terms and consecutive sentences. (C.T. 288-89.) Those five factors were: petitioner induced others to participate in the commission of the crime or occupied a position of leadership or dominance of other participants in its commission, Cal. Ct. R. 4.421(a)(4), the manner in which the crime was carried out indicates planning, sophistication, or professionalism, Cal. Ct. R.

4.421(a)(8), the crime involved an attempted or actual taking or damage of great monetary value, Cal. Ct. R. 4.421(a)(9), the crime involved a large quantity of contraband, Cal. Ct. R. 4.421(a)(10), and the crime involved an abuse of a trusted position, Cal. Ct. R. 4.421(a)(11). (C.T. 288-89.)

2. A jury found petitioner guilty on all counts and allegations, except count 9, upon which the jury was unable to reach a verdict. (C.T. 447-82.) At a bifurcated trial, the jury found the five charged aggravating circumstances true beyond a reasonable doubt. (C.T. 447, 520-22.)

3. Grand theft is punishable by a term of imprisonment of 16 months, two years, or three years. Cal. Penal Code §§ 18, 489(b). On January 5, 2006, the court imposed a three-year upper term on count 5, consecutive eight-month terms for counts 2, 3, 4, 6, 7, 8, 10, 12, 13, and 14, a consecutive three-year term for the enhancement for engaging in a pattern of fraudulent conduct involving a taking over $500,000, and a consecutive two-year term for the on-bail enhancement, for a total prison term of fourteen years, eight months. (C.T. 544-49; R.T. 4530-33.)[1/]

In selecting these terms, the court relied on the five aggravating factors found by the jury. It also found four additional factors by a preponderance of the evidence, three of which involved recidivism. The court found petitioner suborned perjury by writing a letter to her husband asking him to lie for her at trial, Cal. Ct. R. 4.421(a)(6), her prior offenses were of increasing seriousness, Cal. Ct. R. 4.421(b)(2), she was on probation for a prior offense at the time she committed the current offenses, Cal. Ct. R. 4.421(b)(4), and her performance on

---

1. A codefendant was also found guilty of one count of grand theft and was sentenced to the upper term of three years. (C.T. 447-82; R.T. 4343-48.)

probation was necessarily poor, Cal. Ct. R. 4.421(b)(5). (R.T. 4530-33.)

4. The California Court of Appeal affirmed petitioner's judgment and sentence on October 26, 2007, in an unpublished opinion. (Pet. App. 1.) The California Supreme Court denied review on January 3, 2008. (Pet. App. 5.)

## ARGUMENT

### I.

### PETITIONER ENJOYED THE RIGHT TO A JURY TRIAL AND PROOF BEYOND A REASONABLE DOUBT FOR THE AGGRAVATING CIRCUMSTANCE THAT SERVED AS A CONSTITUTIONALLY VALID BASIS FOR IMPOSITION OF CONSECUTIVE TERMS

1. Petitioner first asks this Court to grant a writ of certiorari in this case in light of the recent grant of certiorari in *Oregon* v. *Ice*, No. 07-901. The issue presented in *Ice* is: "Whether the Sixth Amendment, as construed in *Apprendi* v. *New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and *Blakely* v. *Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), requires that facts (other than prior convictions) necessary to imposing consecutive sentences be found by the jury or admitted by the defendant." *Oregon* v. *Ice*, 128 S. Ct. 1657 (2008). Petitioner asserts the imposition of consecutive sentences in her case presents the same constitutional question under *Apprendi* and *Blakely* as in *Ice*. Petitioner is incorrect. Unlike the defendant in *Ice*, petitioner received a jury trial on the aggravating factor relied on by the trial court in imposing consecutive sentences.

The trial court explained its sentencing decision as follows:

I have considered the aggravating and mitigating circumstances, and those set forth by the findings of the jury which are under 4.421, the Rules of Court, subdivision (a) subsection (4), that the defendant induced others to participate in this crime; (8), that there was demonstrated planning and professionalism in the commission of the crime or crimes; (9), that there was a su stantial loss; (10), that there was a large quantity of contraband; and then (11), the defendant abused the position of trust. Those were all findings made by the jury. In addition, there is a (6), that the defendants have suborn[ed] perjury.

I do agree with [the prosecution] that the only reasonable characterization of that letter is such. That was not a finding made by the jury. I'm not sure that's any longer required under the law that a jury make a finding.

I do find that factor exists by a preponderance of evidence.

And then under section – subdivision (b), excuse me, subsection (2) that the defendant's convictions are of increasing seriousness; (4), that she was on probation at the time of these offenses; and (5), that her performance on probation was obviously then poor.

Those are not factors that I believe under – even under previous law need to have been made by the jury, because they go to the defendant's criminal history rather than to the facts of the case.

So those are all the aggravating circumstances that I believe exist in this matter. I've suggested 4.423 of the Rules of Court which outline the statutory mitigating circumstances and find that none of them apply in these circumstances. Beyond that, I have certainly considered the defendant and her circumstances, as I am required to do beyond the

> factors set forth in that code section, and have certainly considered her own – her letters to the Court as well as those written by friends and family.
>
> I do find that the aggravating circumstances outweigh the mitigating substantially so, in particular, that she was on probation for a similar offense at the time. This offense is the chief factor that I have in mind, as well as the subornation of perjury factor as well. On that basis I will select the aggravated term for Count 5 which is a grand theft count of 3 years. Based upon the abuse of a position of trust, I will order that consecutive sentences be served for the following counts: 2, 3, 4, 6, 7, 8, and 10, as well as 12, 13 and 14.

(R.T. 4530-32.)

Abuse of a position of trust was one of the facts found true by the jury beyond a reasonable doubt. (C.T. 521.) Accordingly, to the extent the Sixth Amendment requires that any fact used to impose consecutive sentences be proved to a jury beyond a reasonable doubt, that requirement was necessarily satisfied in petitioner's case.

2. Petitioner does not dispute that a jury found this factor true beyond a reasonable doubt. Instead, she claims in her fourth argument that the jury findings upon which the court relied cannot satisfy the Sixth Amendment jury trial requirement described in *Apprendi* and *Blakely* because the trial court lacked authority under state law to direct the jury to make such findings. Pet. at 26. Petitioner's claim is unavailing. Petitioner did not object at trial to the use of this procedure for finding aggravating factors (R.T. 4081), and has therefore forfeited any claim of procedural error. See *In re Carlos B.*, 76 Cal. App. 4th 50, 55-56, 90 Cal. Rptr. 2d 72, 76 (1999) (acquiescence in court procedure constitutes forfeiture of any claim of impropriety of procedure).

3. Petitioner's claim asserts nothing more than an alleged error of state procedure, rather than a constitutional violation. Certiorari is not warranted to resolve a dispute over state law. Petitioner's claim also fails because it is based on an incorrect assessment of state law. In *Cunningham* v. *California*, 549 U.S. 270, ___, 127 S. Ct. 856, 868-71 (2007), this Court concluded that California's procedures for imposing an upper term sentence violated the Sixth Amendment by assigning to the trial court, rather than a jury, the function of finding aggravating factors used to impose an upper term. *Cunningham*, however, left it to California to select the appropriate method for resolving the constitutional flaw, either by charging juries with the task of finding aggravating factors, or by giving trial courts broader discretion to select the upper term. *Id.* at ___, 127 S. Ct. at 859.

When faced with a determination that a state procedure is constitutionally invalid, California courts are statutorily granted the authority to create new procedures to fill the void. Under Section 187 of the California Code of Civil Procedure, a trial court has the authority to put into effect "all the means necessary" to carry out any statutory or constitutional mandate. Section 187 specifically adds that, in the exercise of this jurisdiction, "if the course of proceeding be not specifically pointed out by this Code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code." This section has been held applicable to criminal proceedings. See, *e.g.*, *Telegram Tribune, Inc.* v. *Municipal Court (Rose)*, 166 Cal. App. 3d 1072, 1077-79, 213 Cal. Rptr. 7, 10-12 (1985). The California Supreme Court has long held that the courts not only have the power to devise necessary procedures to enable statutory schemes, they have a duty to do so. See *People* v. *Jordan*,

65 Cal. 644, 646, 4 P. 683, 684 (1884) ("In the absence of any rules of practice enacted by the legislative authority, it is competent for the courts of this State to establish an entire Code of procedure in civil cases, and an entire system of procedure in criminal cases . . . ."); see also *People* v. *Chew Lang Ong*, 141 Cal. 550, 552-53, 75 P. 186, 187-88 (1904); *People* v. *Walker*, 33 Cal. 2d 250, 265-66, 201 P.2d 6, 15-16 (1949); *People* v. *Hyde*, 49 Cal. App. 3d 97, 101-04, 122 Cal. Rptr. 297, 302-02 (1975); see generally 2 Witkin, California Procedure § 190 (4th ed. 1997) ("[I]t is generally conceived to be more than a power, being described in terms of a duty to exercise jurisdiction by devising a procedure that will permit of its exercise. Both concepts—power and duty—are stated in C.C.P. 187.").

Here, the trial court undertook its duty to adopt a procedure which satisfied the constitutional problem identified in *Cunningham* and enabled to court to effectuate California's sentencing scheme allowing for imposition of an upper term. In so doing, the court did not violate California law. Notably, in the wake of *Cunningham*, at least one California Court of Appeal decision authorized the use of jury findings for aggravating factors. See *Barragan* v. *Superior Court*, 148 Cal. App. 4th 1478, 56 Cal. Rptr. 3d 660 (2007). The California Legislature and the California Supreme Court subsequently opted for the alternative approach of giving the trial court broader discretion to select any of the three terms based on the jury's verdict alone. See *People* v. *Sandoval*, 41 Cal. 4th 825, 843-57, 161 P.3d 1146, 1162-67, 62 Cal. Rptr. 3d 588, 602-14 (2007). However, that decision did not invalidate earlier jury trials on aggravating circumstances. Rather, *Sandoval* decided against adopting the jury trial approach due to concerns that such jury trials could prove too complex and time-consuming in many cases. *Id.* at 843-57, 161 P.3d at 1162-67, 62 Cal. Rptr. 3d at

602-14. Petitioner's jury trial on aggravating factors did not violate state procedures.

4. Petitioner's challenge to California's system for imposing consecutive terms fails for a separate reason. California's system for selecting between concurrent and consecutive terms does not violate the rule of *Blakely* and *Cunningham* because either choice is available to the trial court based solely on the jury's guilty verdict on multiple counts. *People* v. *Black*, 41 Cal. 4th 799, 161 P.3d 1130, 62 Cal. Rptr. 3d 569 (2007). *Black* explained:

> The determination whether two or more sentences should be served in this manner is a "sentencing decision[] made by the judge after the jury has made the factual findings necessary to subject the defendant to the statutory maximum sentence on each offense" and does not "implicate[] the defendant's right to a jury trial on facts that are the functional equivalent of elements of an offense."

*Id.* at 823, 161 P.3d at 1145, 62 Cal. Rptr. 3d at 587.

California Penal Code section 669, governing imposition of concurrent or consecutive sentences, provides that only when the trial court fails to specify whether the imprisonment terms should run consecutively or concurrently, they must run concurrently. The California Supreme Court has explained that section 669's "requirement that concurrent sentences be imposed if the court does not specify how the terms run merely provides for a default in the event the court fails to exercise its discretion." *Black*, 41 Cal. 4th at 822, 161 P.3d at 1145, 62 Cal. Rptr. 3d at 587 (citing *People* v. *Reeder*, 152 Cal. App. 3d 900, 923, 200 Cal. Rptr. 479, 495 (1984)). Moreover, the trial court need not find facts to support its decision, it need only state the reasons for its selection. *Id.* This Court should not disturb this state court interpretation of state law. *Mullaney* v. *Wilbur*, 491 U.S. 684, 691 (1975)

("[S]tate courts are the ultimate expositors of state law [and] we are bound by their constructions except in extreme circumstances"); see also *Ring* v. *Arizona*, 536 U.S. 584, 603 (2002).

Instructively, the requirement of stating the reasons for imposing consecutive sentences contrasts with the requirement of factual findings to impose upper terms under the system examined by this Court in *Cunningham*. *Black*, 41 Cal. 4th at 823, 161 P.3d at 1145, 62 Cal. Rptr. 3d at 587. The requirement that a court state its reasons in making a sentencing decision simply "facilitates appellate review and imposes an intellectual discipline that may lead to better reasoned decisions." *Sandoval*, 41 Cal. 4th at 847, 161 P.3d at 1160 n.9, 62 Cal. Rptr. 3d at 605. (internal quotation marks omitted). There is nothing about a statement of reasons that implicates the right to jury trial. In fact, this Court in *United States* v. *Booker* did not delete the statutory provision requiring a statement of reasons when it severed other provisions in order to render the federal sentencing system compliant with the Sixth Amendment. *United States* v. *Booker*, 543 U.S. 220, 259-60 (2005); see 28 U.S.C. § 3553(c); *United States* v. *Fifield*, 432 F.3d 1056, 1064 (9th Cir. 2005).

*Black* distinguished decisions from other state supreme courts that held their states' consecutive sentencing systems violated *Blakely*, noting that in each of those states, the consecutive sentencing procedure "creates a presumption in favor of concurrent sentences that may be overcome only by factual findings," unlike in California, which has no such presumption or factfinding requirement. *Black*, 41 Cal. 4th at 822, 161 P.3d at 1145, 62 Cal. Rptr. 3d at 587.

The California Supreme Court's decision does not conflict with decisions in other jurisdictions. All the federal circuit courts considering the issue have rejected jury trial

challenges to the federal consecutive sentencing procedure (see 18 U.S.C. § 3584), which also does not require any additional factual findings to impose consecutive sentences. See *United States* v. *Fifield*, 432 F.3d at 1066-67; *United States* v. *Hicks*, 389 F.3d 514, 532 (5th Cir. 2004); *United States* v. *Pressley*, 345 F.3d 1205, 1213 (11th Cir. 2003); *United States* v. *Harrison*, 340 F.3d 497, 500 (8th Cir. 2003); *United States* v. *Lafayette*, 337 F.3d 1043, 1049-50 (D.C. Cir. 2003); *United States* v. *Hernandez*, 330 F.3d 964, 982 (7th Cir. 2003); *United States* v. *Chorin*, 322 F.3d 274, 278-79 (3rd Cir. 2003); *United States* v. *Lott*, 310 F.3d 1231, 1242-43 (10th Cir. 2002); *United States* v. *Campbell*, 279 F.3d 392, 401-02 (6th Cir. 2002); *United States* v. *Feola*, 275 F.3d 216, 220 & n.1 (2d Cir. 2001). Further, several other state supreme courts have found no Sixth Amendment violation where a consecutive sentencing system, like California's, requires no additional factual finding to impose consecutive sentences and has no presumption of concurrent sentencing. *Smylie* v. *State*, 823 N.E.2d 679, 686 (Ind. 2005); *State* v. *Abdullah*, 878 A.2d 746, 756 (N.J. 2005); *State* v. *Cubias*, 120 P.3d 929, 931-32 (Wash. 2005); *State* v. *Jacobs*, 644 N.W.2d 695, 698-99 (Iowa 2001).

The only state supreme court decisions finding *Blakely* violated by consecutive sentencing involved statutes with presumptions of concurrent sentencing and/or a factfinding requirement to impose consecutive sentences. *State* v. *Ice*, 170 P.3d 1049, 1057-59 (Ore. 2007) (a consecutive sentence violates *Blakely* because "consecutive sentencing in this state is not simply a matter of judicial discretion, but can be imposed only after the sentencing judge has made certain legislatively required findings"); *In re Pers. Restraint of VanDelft*, 147 P.3d 573, 578-79 (Wash. 2006) (a non-serious, non-violent, consecutive sentence violates *Blakely* because it is an "exceptional sentence" requiring an aggravating factor to support it and because

Washington law has a presumption of concurrent sentencing); *State* v. *Foster*, 845 N.E.2d 470, 490-91 (Ohio 2006) (a consecutive sentence violates *Blakely* because of Ohio's rule that sentences be run concurrently absent judicial factfinding). Only one state supreme court has found its system *Blakely*-compliant despite a statutory presumption of concurrent sentencing absent additional factual findings. *State* v. *Keene*, 927 A.2d 398, 407 (Me. 2007); but see *id.* at 409 (Calkins, J., dissenting) (finding *Blakely* error because of the presumption).

This examination of the pertinent cases shows that, whether or not there is a significant conflict regarding *Blakely*'s impact on consecutive sentencing where the state has a presumption of concurrent sentencing and a requirement of an additional finding of fact, there is no conflict where, as in California, those features are lacking. Because *Black* accords with other courts' unanimous rejection of Sixth Amendment challenges in this scenario, certiorari should be denied.

## II.

## THE JURY'S FINDING OF FIVE AGGRAVATING FACTORS AND THE PRESENCE OF RECIDIVISM FACTORS AUTHORIZED THE TRIAL COURT TO IMPOSE THE UPPER TERM

Petitioner contends that two flaws remain in California's system for selecting the upper term after *Cunningham*. She argues California has interpreted the recidivism exception to *Blakely* and *Cunningham* too broadly, and asserts that California's elimination of the presumptive middle term was insufficient to resolve the constitutional problem identified in *Cunningham*. Pet. at 21-25. These claims do not warrant a grant of certiorari.

### A. Reliance On Recidivism Factors Does Not Violate The Sixth Amendment

Petitioner's challenge to the appellate court's affirmance based on the increasing seriousness of the prior and current convictions as falling within the recidivism exception to *Blakely* and *Cunningham* should be denied for four independent reasons: (1) there is no lower court conflict on this issue; (2) the court's decision was correct; (3) the relevant language in the sentencing statute at issue has been deleted; and (4) it is unnecessary to reach this question under the facts of this case. See Sup. Ct. R. 10.

1. This Court has repeatedly affirmed that a defendant does not have a right to a jury trial for increased punishment based on the fact of a prior conviction. In *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998), this Court addressed a claim that the defendant had the right to have the prosecution charge as an element in the indictment a statutory provision increasing the punishment based on a judicial finding that a deported alien who returned to the United States had a previous aggravated felony. *Id.* at 226-29. Reviewing past precedent, this Court explained that the "sentencing factor at issue here—recidivism—is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence." *Id.* at 243. This Court specifically noted that "the lower courts have almost uniformly interpreted statutes (that authorize higher sentences for recidivists) as setting forth sentencing factors, not as creating new crimes (at least where the conduct, in the absence of the recidivism, is independently unlawful)." *Id.* at 230. Given this backdrop, the Court concluded that the criminal statute's subject matter, recidivism, should not be treated as an element of an offense and need not have been charged in the indictment. *Id.* at 247.

Citing *Almendarez-Torres*, this Court in *Apprendi*

excluded "the fact of a prior conviction" from the general rule requiring any fact increasing the penalty beyond the prescribed statutory maximum be submitted to a jury and proved beyond a reasonable doubt. *Apprendi*, 530 U.S. at 489-90. This Court explicitly retained the *Almendarez-Torres* exception in *Blakely* and *Booker*, and did so again in *Cunningham*. *Cunningham*, 127 S. Ct. at 860, 864, 868; *Booker*, 543 U.S. at 244; *Blakely*, 542 U.S. at 301; see also *Rita* v. *United States*, 127 S. Ct. 2456, 2486 n.1 (2007); *James* v. *United States*, 127 S. Ct. 1586, 1600 n.8 (2007); *Rangel-Reyes* v. *United States*, 126 S. Ct. 2873, 2874 (2006) (Stevens, J., respecting the denial of certiorari) ("[C]ountless judges in countless cases have relied on *Almendarez-Torres* in making sentencing determinations. The doctrine of *stare decisis* provides a sufficient basis for the denial of certiorari in these cases.").

There is no conflict between the California Supreme Court's interpretation in *Black* and other lower courts in their subsequent interpretation of the scope of the *Almendarez-Torres* exception. Federal circuit courts have overwhelmingly relied on the recidivism rationale of the *Almendarez-Torres* exception to find that it goes beyond the literal fact of a prior conviction to include matters such as the sentence imposed and the status and timing of the defendant's incarceration in relation to subsequent offenses. For example, the Second Circuit has held that the exception allows a trial court to find "not only the mere fact of previous convictions but other related issues as well. Judges frequently must make factual determinations for sentencing, so it is hardly anomalous to require that they also determine the 'who, what, when, and where' of a prior conviction." *United States* v. *Santiago*, 268 F.3d 151, 156 (2d Cir. 2001); see also *United States* v. *Fagans*, 406 F.3d 138, 142 (2d Cir. 2005) ("the type and length of a sentence imposed seem logically to fall within this exception"). The

Eighth Circuit has held that the prior conviction exception applies to "sentencing-related circumstances of recidivism," and has agreed with the Second Circuit's opinion in *Santiago* "that it is entirely appropriate for judges to have 'the task of finding not only the mere fact of previous convictions but other related issues as well.'" *United States* v. *Kempis-Bonola*, 287 F.3d 699, 703 (8th Cir. 2002). The Tenth Circuit has held that "the 'prior conviction' exception extends to 'subsidiary findings' such as whether a defendant was under court supervision when he or she committed a subsequent crime." *United States* v. *Corchado*, 427 F.3d 815, 820 (10th Cir. 2005).

Several state courts of last resort have likewise found that the prior conviction exception includes such facts relating to recidivism. The Maryland Court of Appeals observed that the prior conviction exception "is not limited solely to prior convictions. The general rule is that there is no right to a jury trial on matters related to the broader issue of recidivism." *State* v. *Stewart*, 791 A.2d 143, 151-52 (Md. 2002). The Supreme Courts of Washington, Connecticut, Indiana, and Minnesota have held that the exception includes the issue of whether the defendant was on probation at the time of the current offense. See *State* v. *Jones*, 149 P.3d 636, 640-41 (Wash. 2006); *State* v. *Fagan*, 905 A.2d 1101, 1121 (Conn. 2006); *Ryle* v. *State*, 842 N.E.2d 320, 323-25 (Ind. 2005); *State* v. *Allen*, 706 N.W.2d 40, 47-48 (Minn. 2005). Because the California Supreme Court's interpretation of the *Almendarez-Torres* exception as involving recidivism is in line with the other state and federal court decisions, certiorari is inappropriate.

2. Furthermore, the appellate court's specific application of the exception does not conflict with this Court's authority. The California Court of Appeal observed that petitioner's upper term sentence was authorized based on the trial court's finding that her convictions were of

increasing seriousness. Cal. Ct. R. 4.421(b)(2). The record showed that petitioner had previous convictions for felony welfare fraud in 1997 and check fraud in 1999. (C.T. 552; R.T. 4470-73, 4488-90.) In her current case, petitioner was convicted of ten counts of grand theft, two counts of conspiracy and one count of receiving stolen property, with an enhancement that the fraud involved a taking over $500,000. (C.T. 544-49; R.T. 4530-33.) The two prior isolated crimes, when compared both to the number of current offenses found true by the jury and the significant financial losses determined by the jury, were sufficient to establish the increasing seriousness of her offenses, without the need for any finding beyond the fact of the prior convictions and the current jury verdicts. See *Black*, 41 Cal. 4th at 818-20, 161 P.3d at 1142-44, 62 Cal. Rptr. 3d at 583-85 (contrasting relative seriousness between prior crimes and current offenses).

The California Supreme Court explained in *Black* that whether the defendant's prior convictions were numerous or of increasing seriousness fell under the *Almendarez-Torres* exception. *Black*, 41 Cal. 4th at 819-20, 161 P.3d at 1143, 62 Cal. Rptr. 3d at 585. It reasoned that these findings

> require consideration of only the number, dates, and offenses of the prior convictions alleged. The relative seriousness of these alleged convictions may be determined simply by reference to the range of punishment provided by statute for each offense. This type of determination is quite different from the resolution of issues submitted to a jury, and is one more typically and appropriately undertaken by a court.

*Id.* (internal quotation marks omitted).

In support of this reasoning, *Black* cited, inter alia, the Sixth Circuit's decision in *United States* v. *Smith*, 474 F.3d

888 (6th Cir. 2007). *Black*, 41 Cal. 4th at 819, 161 P.3d at 1143, 62 Cal. Rptr. 3d at 584. In *Smith*, the federal circuit court approved the district court's deviation from the federal guidelines range based on the recidivist finding that the defendant's criminal history was "extensive and egregious." *Smith*, 474 F.3d at 892. The court found that the *Almendarez-Torres* exception was "wide enough to encompass the district court's finding here." *Id.* at 891.

Like the finding in *Smith* that the defendant's criminal history was extensive and egregious, the trial court's finding in this case that petitioner's prior convictions were of increasing seriousness fell under the *Almendarez-Torres* exception for recidivist facts. A court's evaluation of whether a defendant's prior convictions are serious is just as much a traditional consideration at sentencing as the finding of the prior convictions themselves. The *Almendarez-Torres* rationale for excluding "recidivism" from being considered elemental applies equally to this evaluation. The state court's application of the *Almendarez-Torres* exception to *Cunningham* was correct.

3. The statute petitioner was sentenced under in this case, California Penal Code section 1170(b), was amended to comply with *Cunningham* and no longer requires any fact-finding to impose the upper term. See *Sandoval*, 41 Cal. 4th at 849-50, 161 P.3d at 1162, 62 Cal. Rptr. 3d at 607-08. Thus, the question of whether prior convictions of increasing seriousness or numerousness falls under this Court's recidivism exception is one that has no prospective relevance in California. See R. Stern et al., Supreme Court Practice 247 (9th ed. 2007).

4. Finally, the resolution of this question would have no impact on this case because the trial court also relied on the five aggravating factors found true by the jury, in compliance with *Blakely* and *Cunningham*. In *Black*, the California Supreme Court explained that an upper term

sentence based on at least one aggravating circumstance complying with *Cunningham* "renders a defendant *eligible* for the upper term sentence," so that "any additional fact finding engaged in by the trial court in selecting the appropriate sentence among the three available options does not violate the defendant's right to jury trial." *Black*, 41 Cal. 4th at 812, 161 P.3d at 1138, 62 Cal. Rptr. 3d at 578. The court explained, "Under California's determinate sentencing system, the existence of a single aggravating circumstance is legally sufficient to make the defendant eligible for the upper term." *Id.* at 813, 161 P.3d at 1138-39, 62 Cal. Rptr. 3d at 579 (citing *People* v. *Osband*, 13 Cal. 4th 622, 728, 919 P.2d 640, 709, 55 Cal. Rptr. 2d 26, 95 (1996)). Further,

> so long as a defendant is *eligible* for the upper term by virtue of facts that have been established consistently with Sixth Amendment principles, the federal Constitution permits the trial court to rely upon any number of aggravating circumstances in exercising its discretion to select the appropriate term by balancing aggravating and mitigating circumstances, regardless of whether the facts underlying those circumstances have been found to be true by a jury.

*Black*, 41 Cal. 4th at 813, 161 P.3d at 1138, 62 Cal. Rptr. 3d at 579 (citing *Rita* v. *United States*, 127 S. Ct. at 2465-66, *Blakely*, 542 U.S. at 309, *Apprendi*, 530 U.S. at 481-82, and *Harris* v. *United States*, 536 U.S. 545, 558, 560 (2007)).[2/] An aggravating circumstance accords with the right to jury trial if it was based on the defendant's criminal history or a fact found by the jury. *Black*, 41 Cal. 4th at 815, 161 P.3d at 1140, 62 Cal. Rptr. 3d at 581.

---

2. Petitioner does not challenge the validity or the constitutionality of the California Supreme Court's holding on this point.

Given that only one *Blakely*-compliant aggravating circumstance was necessary to authorize the upper term, petitioner's sentence was constitutional in light of the five factors found by the jury, without regard to the trial court's reliance on the recidivist aggravating factor at issue. Thus, this issue cannot affect the outcome of this case, making a grant of certiorari inappropriate. See R. Stern et al., Supreme Court Practice at 248 (citing *Sommerville* v. *United States*, 376 U.S. 909 (1964)).

### B. Petitioner's Challenge To California's Reformed Sentencing System Is Not Justiciable

1. Petitioner also challenges California's sentencing scheme, contending that the judicial and statutory reforms imposed in response *Cunningham* did not resolve the constitutional problems identified in *Cunningham*. However, petitioner was sentenced by the trial court on January 5, 2006, before certiorari was granted in *Cunningham*. Petitioner was not sentenced under the post-*Cunningham* revised sentencing system, and that revised system has never been applied to her. Accordingly, petitioner's claim is not presented on the record in this case.

This Court may not issue advisory opinions, because "Article III, § 2, of the Constitution extends the 'judicial Power' of the United States only to 'Cases' and 'Controversies.'" *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83, 102 (1998). The controversy "must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Aetna Life Ins. Co. of Hartford, Conn.* v. *Haworth*, 300 U.S. 227, 241 (1937). For a party to have standing to bring a case before this

Court, "[t]he controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests." *Id.* at 240-41. "The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally." *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975).

The state court has not ordered petitioner resentenced under a reformed statutory system. Thus, this case presents no controversy over the propriety of such a procedure under the Constitution. This Court does not sit to redress hypothetical injury. Even if this Court granted certiorari and reversed the California court's judgment, and even if the state court on remand ordered resentencing under the reformed system in *Sandoval*, it is unknown whether petitioner would receive the upper term or a lesser sentence. Thus, the question is not ripe for this Court's consideration. See generally *Ohio Forestry Association, Inc.* v. *Sierra Club*, 523 U.S. 726, 732-33 (1998); *Anderson* v. *Green*, 513 U.S. 557, 559 (1995).

2. In any event, the California Supreme Court's elimination of the factfinding requirement by deleting the middle term presumption in the California determinate sentencing law, and application of this amended system to resentencings, is analogous to this Court's elimination in *Booker* of the factfinding requirement by deleting the mandatory aspect of the federal guidelines, and application of that amended system to resentencings. Compare *Booker*, 543 U.S. at 259-60, 268, with *Sandoval*, 41 Cal. 4th at 852-57, 161 P.3d at 1164-67, 62 Cal. Rptr. 3d at 609-14. The California Supreme Court noted, "[r]elying upon the principles established in *Rogers* [v. *Tennessee*, 532 U.S. 451 (2001)], every federal court that has considered the issue has rejected the argument that application of the United States Supreme Court's 'remedial interpretation' of the

federal sentencing statutes in [*Booker*] to cases pending on appeal would deny due process of law." *Id.* at 857-58, 161 P.3d at 1167, 62 Cal. Rptr. 3d at 613-14 (citing cases). Petitioner was put on notice by the state statute that she could receive the upper term, so application of the California Supreme Court's subsequent judicial construction of the statute does not violate ex post facto or due process principles. *Id.* (citing *Rogers*, 532 U.S. at 460-61, 464, 466); see *United States* v. *Lata*, 415 F.3d 107, 110-12 (1st Cir. 2005). *Sandoval* is consistent with the uniform and correct resolution of this issue in the federal courts.

## CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

Dated: June 4, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of California

DANE R. GILLETTE
Chief Assistant Attorney General

GERALD A. ENGLER
Senior Assistant Attorney General

DONALD E. DE NICOLA
Deputy State Solicitor General

STAN HELFMAN
Supervising Deputy Attorney General

LAURENCE K. SULLIVAN
Supervising Deputy Attorney General

JEFFREY M. LAURENCE
Deputy Attorney General
Counsel of Record

Counsel for Respondent

20114829.wpd
SF2008401526